COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

GLORIA MARTIN,	:	Docket Nos. E-24995-A
MURIEL DAUB,	:	E-24996-A
ELSIE WATTS, and	:	E-24997-A
FERN GINGRICH,	:	E-24998-A
Complainants	:	
v.	:	
TRUCK TERMINAL MOTELS OF AMERICA, INC.	:	
Respondent	:	

STIPULATIONS

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

GLORIA B. MARTIN, MURIEL DAUB, ELSIE WATTS, FERN G. GINGRICH	:	
Complainants	:	
v.	:	DOCKET NOS. E-24995-A E-24996-A E-24997-A E-24998-A
TRUCK TERMINAL MOTELS OF AMERICA, INC.	:	

STIPULATIONS

The following facts are admitted by the parties, and no further proof thereof shall be required.

1. Complainant Martin is an individual born June 10, 1933.

2. Complainant Daub is an individual born June 25, 1934.

3. Complainant Watts is an individual born December 6, 1927.

4. Complainant Gingrich is an individual born November 19, 1938.

5. Respondent is a person employing four or more persons within the Commonwealth.

6. Respondent hired Complainant Martin as a waitress on January 1, 1977.

7. Respondent hired Complainant Daub as a waitress on December 28, 1979.

8. Respondent hired Complainant Watts as a waitress on April 21, 1980.

9. Respondent hired Complainant Gingrich as a dishwasher on February 5, 1982.

10. Respondent assigned Complainant Gingrich to back-up cook duties beginning on November 26, 1982.

11. All four complainants worked in the restaurant of Respondent's truck stop, Plaza 78, located in Myerstown, PA.

12. James W. Lukens, III became Respondent's President on or about September 15, 1981.

13. On or about March 1, 1983, Respondent discharged its restaurant manager, Thomas Spannuth (age 55).

14. Mary Musser (age 39), who had worked for Respondent primarily as a baker, became manager of the restaurant on or about February 28, 1983.

15. Respondent discharged Complainant Martin on March 2, 1983.

16. At the time of her dismissal, Complainant Martin was 49 years old.

17. No written record exists of any disciplinary warning or action against Complainant Martin.

18. Respondent's separation record shows "management change" as the reason for Martin's separation from employment.

19. Respondent discharged Complainant Daub on or about March 2, 1983.

20. At the time of her dismissal, Complainant Daub was 48 years old.

21. No written record exists of any disciplinary warning or action against Complainant Daub.

22. Respondent's separation record shows "management change" as the reason for Daub's separation from employment.

23. Respondent discharged Complainant Watts on or about March 2, 1983.

24. At the time of her dismissal, Complainant Watts was 55 years old.

25. No written record exists of any disciplinary warning or action against Complainant Watts.

26. Respondent's separation record shows "management change" as the reason for Watts' separation from employment.

27. Jake Getz, Jr. discharged Complainant Gingrich on or about March 2, 1983.

28. At the time of her dismissal, Complainant Gingrich was 44 years old.

29. No written record exists of any disciplinary warning or action against Complainant Gingrich.

30. Respondent's separation record shows "management change" as the reason for Gingrich's separation from employment.

31. At the time of their dismissal, Complainants had been working on the second shift (3:00-11:00 p.m.).

32. At the time Complainants were dismissed, Helen Lake (age 53), hired 2/15/80, was the regular second shift supervisor.

33. On March 14, 1983, Complainants made, signed, and filed with the Pennsylvania Human Relations Commission ("Commission") written verified complaints.

34. On or about April 26, 1983, Respondent answered the complaints.

35. After investigation, the Commission determined that probable cause existed for crediting the allegations of the complaints and endeavored, without success, to conciliate the complaints.

36. The Commission notified the parties that a public hearing had been approved.

37. According to Respondent's Exhibit "A" and Respondent's separation records, eight individuals were separated from employment in the restaurant in the period from February 28 through March 2, 1983 for reasons of "management change" or "change of management":

1) Muriel Daub, waitress, was age 48;

2) Gloria Martin, waitress, was age 49;

3) Elsie Watts, waitress, was age 55;

4) Jonathan Batdorf, grill cook, was age 24;

5) Erma Dieffenbach, shift supervisor, was age 53;

6) Fern Gingrich, dishwasher/back up cook, was age 45;

7) Thomas Spannuth, restaurant manager, was age 55;

8) Michael Turner, grill cook, was age 28.

38. Complainant Martin's available W-2 wages, tips, and other compensation are:

1980	Truck Terminal Motels of America, Inc.	$6,916.16
1981	Truck Terminal Motels of America, Inc.	7,370.00
1982	W-2 is missing	
1983	Truck Terminal Motels of America, Inc.-	1,330.08
1983	McPeake's Country Diner -	4,316.83
1984	Truckstops Corp. of America -	4,119.68
1984	Karas & Reber Pot-O-Gold -	2,557.34
1985	W-2 is missing; 1040 amount is -	6,754.00
1986	Karas & Reber Pot-O-Gold -	7,550.44
1987	Karas & Reber Pot-O-Gold -	5,824,50
1987	Country Apple Restaurant -	1,341.01

39. Complainant Daub's W-2 wages, tips, and other compensation are:

1980	Truck Terminal Motels of America, Inc.	$5,153.39
1981	Truck Terminal Motels of America, Inc.	5,181.55
1982	Truck Terminal Motels of America, Inc.	5,527.96
1983	Truck Terminal Motels of America, Inc.-	1,071.37
1983	Farmers Wife Family Restaurant -	2,915.46
1984	Farmers Wife Family Restaurant -	840.49
1984	Farmers Wife Restaurant -	3,969.01
1985	Farmers Wife Restaurant -	2,885.75
1986	Karas & Reber Pot-O-Gold -	674.97
1987	Karas & Reber Pot-O-Gold -	1,203.85

40. Complainant Watts' W-2 wages, tips, and other compensation are:

1980	W-2 not available	
1981	Truck Terminal Motels of America, Inc.-	$7,063.34
1982	Truck Terminal Motels of America, Inc.-	7,396.95
1983	Truck Terminal Motels of America, Inc.-	1,204.73
1983	Alva Hotel & Restaurant, Inc. -	504.01
1983	Scotty Lynn Family Restaurant -	2,424.11
1984	C & D Paulvir -	61.98
1984	Scotty Lynn Family Restaurant -	3,439.37
1984	TruckStops Corp. of America -	3,672.04
1985	TruckStops Corp. of America -	7,304.62
1986	SP Oil, Inc. -	810.04
1986	Sohio Oil Co. -	4,182.87
1986	TruckStops Corp. of America	4,648.80
1987	Sohio Oil Co. -	6,855.62
1987	Don's Food Rite, Inc.	2,483.00

41. Complainant Gingrich's W-2 wages, tips, and other compensation are:

1982	Not available	
1983	Truck Terminal Motels of America, Inc.-	$1,320.24
1983	Scotty Lynn Family Restaurant -	2,460.69
1983	Darjan Co. -	646.88
1984	Darjan Co. -	516.69
1985	No W-2 earnings	
1986	No W-2 earnings	
1987	No W-2 earnings	

Francine Ostrovsky
FRANCINE OSTROVSKY
Attorney for Commission
in support of the complaints

Dated: 12-5-88

Karl R. Hildabrand
KARL R. HILDABRAND
Attorney for Respondent

Dated: 12-5-88

FINDINGS OF FACT*

1. The Respondent, Truck Terminal Motels of America, Inc., (hereinafter "TTMA"), began operations in 1969 as a public company. (N. T. 305, 307)

2. Between 1969 and 1981, dividends of 5% per share were paid only once because TTMA's operations had been losing a great deal of money. (N. T. 306, 307)

3. In 1981, TTMA's Board of Directors fired the then company President and recruited and hired James W. Lukens, III, (hereinafter "Lukens"), as the candidate selected to endeavor to turn the company's rather bleak financial picture around.

4. In 1981, TTMA had four facilities at various locations, the largest of which was The Frystown Plaza, (hereinafter "Frystown"). (N. T. 308)

5. Frystown was a 24 hour operation with over 100 employees. The facility was designed to principally service trucks and their drivers, and other travellers as Frystown operated a motel, restaurant, store, radio repair shop, fuel desk, truck wash, and garage. (N. T. 309)

* The foregoing "Stipulations" are hereby incorporated herein as if fully set forth. To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N. T. Notes of Testimony
C. E. Complainants' Exhibit
R. E. Respondent's Exhibit
S. F. Stipulations of Fact

6. Truck plaza competition in the local market is very competitive as there are 14 area truck stops. (N. T. 315). For example, one TTMA's plaza is one of 5 truck stops located in the 5th busiest truck interchange in the United States. (N. T. 315)

7. In the tumultuous transition period between September 1981, when Lukens took over, and the beginning of 1983, when the Complainants were terminated, substantial fiscal, operational, marketing, and personnel changes were instituted. (N. T. 309, 312)

8. In Lukens' "hands on" management style, numerous managers and employees were fired from TTMA's various locations. (N. T. 310, 311)

9. Shortly after Lukens took over, one of TTMA's locations had to be sold to keep TTMA's payroll going. (N. T. 311). Accordingly, Lukens had a sense of urgency regarding the time frame under which he needed to make changes. (N. T. 311)

10. Two of TTMA's plazas had restaurants: Frystown and Pine Grove. (N. T. 312)

11. Although both restaurants were not doing well financially, Pine Grove Plaza's restaurant was worse off than Frystown's. (N. T. 313)

12. In the summer of 1982, Don Lance, Pine Grove's restaurant manager was terminated and Frystown's restaurant manager, Tom Spannath (hereinafter "Spannath"), managed both Pine Grove and Frystown restaurants for a short period. (N. T. 312, 313)

13. In October 1982, Lukens selected Mary Musser, (hereinafter "Musser"), to manage Pine Grove's restaurant. (N. T. 316). Spannath returned to managing Frystown only. (N. T. 316)

14. Prior to her selection, Musser had worked at Frystown principally as a baker for approximately 9 years. (N. T. 430)

15. Upon Musser's appointment at Pine Grove almost immediate improvements in the quality of food and service, atmosphere, and employee morale were noted. (N. T. 316, 319)

16. In Lukens' perception, Frystown remained mediocre. (N. T. 319)

17. From the time Lukens became President until Spannath was terminated on March 1, 1983 Lukens received complaints regarding Spannath from customers, employees, and managers from other departments. (N. T. 319, S. F. 13)

18. Customers were complaining of substandard service, quality of food, atmosphere, and employee morale. (N. T. 321)

19. Lukens also perceived that much internal employee turmoil emanated from perceptible conflict and bickering on the second shift: (3:00 p.m.-11:00 p.m.). (N. T. 324)

20. All four Complainants worked the second shift. (N. T. 92, 93, 110, 135, 186, 211)

21. With an eye toward turning Frystown's restaurant around, Lukens contemplated Spannath's termination. (N. T. 326)

22. Because of her success at Pine Grove, Lukens looked to Musser as the likely replacement for Spannath. (N. T. 326)

23. When Lukens asked Musser if she would become the restaurant manager at Frystown, Musser made her acceptance conditional. (N. T. 327)

24. Musser's prior experience at Frystown left her with reservations beyond the problems Spannath created. (N. T. 327)

25. Of the approximately 35-40 waitresses at Frystown, Musser identified Martin, Daub, and Watts as waitresses with whom Musser felt she could not work. (N. T. 328)

26. Musser also listed Gingrich, a dishwasher-backup cook, two cooks and one shift supervisor, as additional employees with whom Musser perceived she would be unable to work. (N. T. 328)

27. After discussion with Musser, Lukens' initial intention to terminate only Spannath changed to encompass the termination of the 7 additional employees mentioned by Musser. (N. T. 339)

28. Musser individually outlined her reservations to Lukens regarding why Musser wanted the 7 additional employees terminated. (N. T. 329, 436, 441)

29. Regarding the 4 Complainants, Musser indicated that her overall general concern was that the 4 Complainants had been part of a clique which created fussing and bickering between members on the 2nd shift and between other shifts, and further Musser indicated she believed that the Complainants would not work for her. (N. T. 434, 439)

30. Individually, Musser's other articulated concerns she relayed to Lukens were generally:

a. Martin - unprofessional conduct, and either unresponsive or showed anger to customers. (N. T. 436)

b. Watts - slow and forgetful, and often read while customers waited. (N. T. 438, 439)

c. Daub - slow, and when fell behind got angry in front of customers. (N. T. 440)

d. Gingrich - bad attitude and played around too much. (N. T. 441)

31. Musser indicated that while employed at Frystown, she had become aware of perceived deficiencies in each Complainant from personal observation, customer complaints, and discussions with other TTMA employees. (N. T. 437, 439, 440, 441, 508)

32. At about the time of the Complainants' discharges, Jake Getz, (hereinafter "Getz"), the Frystown fuel desk manager, asked Lydia Tirado-Cox, a part time waitress, if she was interested in working full time, and in effect told her TTMA was firing Martin, Daub, and Watts and he wanted younger, prettier waitresses. (N. T. 27)

33. Getz was neither involved in the decision to terminate the Complainants nor a participant in the decision regarding replacements for the Complainants. (N. T. 341)

34. Getz was later recognized by Lukens as a "womanizer" and was terminated. (N. T. 391)

35. Helen Lake-Darkas, (hereinafter "Darkas"), the mild-mannered permanent 2nd shift supervisor for whom the Complainants worked generally described the Complainants as follows:

a. Martin - neat, prompt, cooperative (N. T. 97)

b. Watts - devoted, helpful, willing (N. T. 97, 98)

c. Daub - prompt, neat, hospitable (N. T. 98)

d. Gingrich - flexible, cooperative (N. T. 98)

36. Darkas also indicated that she neither received complaints regarding the Complainants' job performances nor was she ever asked to evaluate employees. (N. T. 98)

37. When asked, Erma Dieffenbach, another shift supervisor for whom the Complainants worked, had nothing negative to say regarding the Complainants' performances. (N. T. 111, 112)

38. Dieffenbach was terminated at approximately the same time as the Complainants. (N. T. 109). Darkas was terminated in July 1983. (N. T. 101)

39. Mildred Balthaser, the swing shift supervisor, for whom the Complainants worked approximately 3 nights per week, generally described the Complainants as follows:

a. Martin - resented authority, defiant, nasty to customers, and displayed inappropriate behavior. (N. T. 464, 465)

b. Daub - courteous for the most part but easily flustered, lost composure and caused public scenes, made customers irate. (N. T. 466, 467)

c. Watts - constantly reading, slow, in her own world, defiant. (N. T. 468, 469)

d. Gingrich - resented everything, defiant, created tense atmosphere. (N. T. 472)

40. Balthauser indicated the only problem at Frystown was on the 2nd shift. (N. T. 473)

41. Balthauser too felt she would be unable to do her job if the 4 Complainants remained. (N. T. 477)

42. Iris Fox, a co-worker waitress at the time of the Complainants' discharges, generally described the Complainants as follows:

a. Martin - rude, inadequate service, inappropriate behavior, ignored some customers, generally unprofessional. (N. T. 494, 499)

b. Daub - slow, unorganized, repeated errors. (N. T. 500, 501)

c. Watts - slow, repeated errors, unprofessional, always reading while at work. (N. T. 502, 503)

d. Gingrich - no opinion expressed. (N. T. 504)

43. Using the pure theory that selections were random arbitrary actions, application of a hypergeometric distribution hypothesis test to the Respondent's discharge of 8 employees from Frystown on or about February 28, 1983 discloses "significant statistical evidence" that employees over 40 were more likely to be discharged than were employees under 40. (N. T. 51, 54, 72)

44. The terminations of the Complainants and four others on or about February 28, 1983 were not random and arbitrary actions about which a hypergeometric distribution hypothesis test might support a strong inference of discrimination. (N. T. 72, 74, 343)

45. In the final analysis, the statistical evidence presented by the Complainants was an oversimplified and unreliable showing of a disproportionate effect which at best provided some foundation for further analysis by simply raising burden-shifting questions. (N. T. 72, 74, 78)

46. The Respondent's statistical numbers presented a more accurate, complete, and relevant picture of the Respondent's operations than did the Complainants' limited statistical showing. (N. T. 345, 364 REX. 8, 13)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of these consolidated cases.

2. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing of these cases.

3. The Complainants are individuals within the meaning of the Pennsylvania Human Relations Act (P.H.R.A.).

4. The Respondent is an employer within the meaning of the P.H.R.A.

5. The consolidation of these cases was appropriate because the claims are logically related, and each relied on substantially similar evidence.

6. A Complainant is not limited to either statistical proof or a McDonnell Douglas Corp. v. Green formula to establish a prima facie case.

7. Direct evidence may be used to prove discrimination.

8. Complainants were unable to establish a case of direct evidence of unlawful age discrimination.

9. Complainants did establish a prima facie case by presenting relevant statistical evidence and by showing that:

   a. At the time of their discharges, the Complainants belonged to a protected class;

   b. The Complainants were performing duties that they were qualified to perform;

   c. The Complainants were discharged; and

   d. There was a continuing need for the services the Complainants had been performing.

10. The Respondent offered legitimate non-discriminatory reasons for its termination of the Complainant.

11. The Complainants failed to establish by a preponderance of the evidence that the reasons for their terminations articulated by the Respondent were pretextual.

12. Judgment of credibility is a responsibility entrusted to the trier of fact.

13. Witnesses for the Respondent offered credible testimony.

OPINION

Over an objection by the Respondent, these four cases were consolidated for Public Hearing as each of the four complaints were logically related, and the Hearing Examiner had determined that it was both convenient and economical to resolve common questions at one hearing. The four consolidated cases arose on PHRC complaints filed by Gloria Martin, (hereinafter "Martin"), Muriel Daub, (hereinafter "Daub"), Elsie Watts, (hereinafter "Watts"), and Fern Gingrich, (hereinafter "Gingrich"), against Truck Terminal Motels of America, (hereinafter either "TTMA" or "Respondent"). Each Complainant individually alleged that her employment was unlawfully terminated because of her age in violation of Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P. L. 744, as amended, 43 P. S. §§951 et seq. (hereinafter "PHRA").

PHRC staff investigated the allegations of the four complaints and after the investigations were completed, informed the Respondent that probable cause existed to credit the Complainants' allegations. Thereafter, the PHRC attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion but such efforts proved unsuccessful. Subsequently, the PHRC notified the Respondent that it had approved Public Hearings for these cases.

The consolidated Public Hearing was held on December 5 and 6, 1988 in Bethel, PA, before Hearing Examiner Carl H. Summerson. The consolidated case on behalf of the Complaints was presented by PHRC staff attorneys Francine Ostrovsky and Patricia Miles. Karl Hildabrand, Esquire, appeared on behalf of the Respondent. Following the Public Hearing, the parties were afforded an opportunity to submit briefs. Post-hearing briefs were received early March, 1989.

Recognizing that the circumstances presented in these cases allege disparate treatment, we begin our analysis by also recognizing that the Complainants attempted to establish their prima facie cases in three

distinct ways: Direct evidence; Statistically; and by the often used McDonnell Douglas Corp. v. Green, 411 U. S. 792 (1973), three part allocation of proof scenario. A P.H.R.A. Complainant is not limited to the McDonnnell Douglas formula or statistical proof in their effort to establish a prima facie case. See eg. Spagnuolo v. Whirlpool Corp., 641 F.2d 1109 (4th Cir.), Cert. denied, 454 U. S. 860 (1981); Cline v. Roadway Express, 689 F.2d 481, 29 FEP 1365 (4th Cir. 1982).

Here, an attempt was made to prove that age was unlawfully used as a factor in the Complainants' discharges by use of direct evidence. The Complainants offered the testimony of Lydia Tirado-Cox as evidence of a direct announcement which the Complainants argue unmistakably indicates that age was a determining factor in their discharges. Tirado-Cox testified that in March 1983 a Respondent employee, Jake Getz, in effect told her that TTMA was going to be getting rid of the Complainants and that he wanted younger, prettier waitresses. This testimony was adduced in the content of Tirado-Cox's position as a part-time waitress and Getz was asking Tirado-Cox if she wanted a full time position.

The Respondent objected to the admission of this testimony arguing that it is hearsay, however, the statement was provisionally admitted for several reasons. First, where there is other evidence supportive of hearsay evidence, there is no error in admitting the hearsay. Bruckner v. Lancaster County Area Vo-Tech Joint Operating Committee, 70 Pa. Commonwealth Ct. 522, 453 A.2d 384 (1982). Second, at the time the testimony was given, it was unclear whether the statements attributable to Getz were admissible as admissions by a party-opponent. Getz's position with the Respondent is critical to the question of whether such statements can be deemed an admission. Age-related remarks can be probative only if they are connected with the adverse action taken against a particular employee. See Castle v. Sangamo Weston, Inc., 41 FEP 962 (D.C.M. Fla. 1986). Also, the weight of a statement depends on who made it and the surrounding circumstances. See White v. University of Mass., 26 FEP 1672 (D. Mass. 1981).

Evaluating the statements attributable to Getz in the light of the surrounding circumstances here, we find that the weight attributable to Getz's comments is significantly diminished. Getz was neither responsible for nor in a position to influence the decision to terminate the Complainants. Although a supervisor at Frystown, Getz was the fuel area manager and had no direct supervisory duties in the restaurant area of the Frystown truck stop.

Age-related comments can be relied upon in certain cases as evidence of a discriminatory intent, see e.g., Scofield v. Bolts & Bolts Retail Stores, 21 FEP 1478 (S.D.N.Y. 1979), however, in these cases, the Complainants are unable to rely on the comments Tirado-Cox attributed to Getz as direct evidence of a discriminatory motive.

Another comment allegedly made suffers similar problems. Martin testified that Lukens' father in effect commented that the Complainants were terminated because like a ballgame, they wanted new players. Like Getz, Lukens' father too had no measurable input regarding the decision to terminate the Complainants. Furthermore, standing alone, "wanting new players" is consistent with management changes and is simply a generalized expression having no particular bearing on the issue of age as an unlawful motivational factor. Once again evaluating the alleged statement by Lukens' father in the light of the surrounding circumstances leads to the conclusion that the Complainants have failed to set forth direct evidence of an intent to discriminate.

Regarding the Complainants' statistical evidence, they presented an expert witness, Dr. Michael D. Fry, who concluded that there was "significant statistical evidence" that, as a result of the Respondent's management change on or about February 28, 1983, employees over 40 were more likely to be discharged than employees under 40. Dr. Fry testified that he applied a hypergeometric distribution test when he reviewed the discharge of

restaurant manager Spannath and seven others including the four Complainants. Six of the eight discharged were over 40. Dr. Fry described his methods indicating that he did not take into consideration any of the reasons given by the Respondent for the discharges but instead began his hypothesis with the theory that the selections for termination were random. Also, Dr. Fry agreed that the sample was small as he in effect looked strictly at a single event consisting of the termination of Spannath and the seven others along with him.

Federal courts have recognized that the sample size of quantitative evidence effects the evidentiary weight of statistics. See e.g., Keely v. Westinghouse Electric Corp., 404 F.Supp. 573, 11 FEP 1408 (E.D. Mo. 1975); and Ocha v. Monsanto Co., 473 F.2d 318 (5th Cir. 1973). Also, the U. S. Supreme Court, although endorsing the use of statistics, nevertheless cautioned that "[s]tatistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances. "Teamsters v. U. S., 431 U. S. 324 at 340 (1977).

In these cases, the probative value of the Complainants' statistical evidence depends on two factors: First, the stage of proof involved and second, the idea that they can be viewed in combination with prima facie McDonnell Douglas model evidence. In Hazelwood School District v. U. S., 433 U. S. 299 (1977), the U. S. Supreme Court noted that "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practices of discrimination." Id at 307-08. However, federal courts have been quick to point out that the generalization that statistics alone may establish a prima facie case should not ordinarily apply to an individual disparate treatment suit in which a Complainant must create an inference of discriminatory motivation. See 2 Larson, Employment Discrimination, §50.82 n.14 at 10-127-129 (1986).

Here, Dr. Fry candidly recognized that on the ultimate question of

whether there was age discrimination he could make no experiment about which he could even state probabilities. (N. T. 62). Dr. Fry's observation is consistent with the premise that courts clearly recognize that even under ideal conditions statistics cannot conclusively prove intentional discrimination. Baldus, Cole, Statistical Proof of Discrimination, §1.22 at 26.

Because the Complainants' statistical sample was comparatively small and because of the limited role of statistics in disparate treatment cases, the Complainants' statistical showing is probative only in conjunction with the Complainants' evidence regarding the traditional McDonnell Douglas prima facie showing. The combination of the two showings thus serves a question raising, burden-shifting function.

The oft-repeated McDonnell Douglas allocation of proof formula has been recently clarified by the Pa. Supreme Court in Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987). The Pa. Supreme Court's guidance indicates that the Complainants must first establish a prima facie case of discrimination. If the Complainants establish a prima facie case, the burden of production then shifts to the Respondent to "simply...produce evidence of a 'legitimate, non-discriminatory reason' for...[its action]." Id at 318. If the Respondent meets this production burden, in order to prevail, the Complainants must demonstrate that the entire body of evidence produced demonstrates by a preponderance of the evidence that the Complainants were the victims of intentional discrimination. Id at 318. The complainants may succeed in this ultimate burden of persuasion either by direct persuasion that a discriminatory reason more likely motivated the Respondent or indirectly by showing that the Respondent's proffered explanation is unworthy of credence. Texas Department of Community Affairs v. Burdine, 450 U. S. 248, 256 (1981). In Montour School District v. PHRC, 109 Pa. Commonwealth Ct. 1, 530 A.2d 957 (1987) the court in effect adopted

the following McDonnell Douglas formula prima facie burden in an age discrimination case:

1. At the time of the challenged action Complainant belonged to a protected class;
2. Complainant was performing duties that she was qualified to perform;
3. Complainant was discharged from her position; and
4. There was a continuing need for the services Complainant had been performing.

Clearly, each of the Complainants quite easily meet this burden designed not to be onerous. Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124,, 532 A.2d 315 (1987). In February, 1983, the Complainants were each over 40 years old. Three Complainants were performing the duties of a waitress and Gingrich was performing as a dishwasher/backup cook. All Complainants were qualified for the positions they held and each Complainant was in fact discharged. Lastly, the Complainants were replaced thereby showing that there was a continuing need for the services they had been performing. Accordingly, these general factors added to the statistical evidence presented by Dr. Fry create a presumption of intentional discrimination.

In order to rebut this presumption the Respondent was obliged to articulate some legitimate nondiscriminatory reason why the Complainants were discharged. Here, the Respondent successfully met its burden of production by producing evidence of reasonable factors other than age and a statistical review of several years of the Respondent's termination and hiring practices. Statistics may be offered by a Respondent to rebut a prima facie case. See i. e. Furnco Construction Corp. v. Waters, 438 U. S. 567 (1978); and Laugeson v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975).

Beyond simply challenging the minimal probative force of the Complainants' statistical showing, the statistical numbers credibly presented by the Respondent present a more complete and relevant picture than did the Complainants' limited statistical showing. The Complainants' statistics ignored everything except the terminations of eight employees during a three day time period. The Respondent's statistics evaluate the composition of the Respondents' entire workforce over a much longer time period. The Respondent's expanded statistical version seriously undermines the Complainants' version. Additionally, since neither side focused much attention on the relevant labor market, the only evidence presented for consideration in this regard must be given some weight. The Respondent compared its workforce composition experience with national averages of food service labor forces by age outlined in an October 1987 magazine article taken from Restaurants USA. The composition of the Respondent's overall work force significantly parallels the national trends of food preparation and service workers by age.

The presumption created by the Complainants' prima facie showing was totally undermined by the other half of the Respondent's rebuttal. Clear credible evidence of reasonable factors other than age permeate the record in this case.

The Respondent's rebuttal begins with a chronological portrait of TTMA's economic status. From TTMA's creation in 1969, TTMA experienced financial decline as their profit/loss picture reflected more loss than profit. In 1981, TTMA hired Lukens, giving him discretionary direction to change the tide of the financial woes of TTMA. From the outset, Lukens began to make drastic changes in TTMA's operations in an effort to correct perceived deficiences which led to budgetary problems. Although Complainants' objected to the introduction of evidence of TTMA's financial history, such evidence was admitted as budgetary reasons have been held as

justification for a Respondent's actions. See e.g., Faro v. New York University, 502 F.2d 1229, 8 FEP 609 (2nd Cir. 1974).

Lukens credibly testified that he had originally intended to fire only Spannath as a measure to make the Frystown restaurant more profitable. The idea to fire the Complainants came from Musser at the time Lukens approached Musser to ask her if she would take Spannath's managerial position once Lukens fired Spannath. Lukens and Musser agree that Musser made her acceptance of the Frystown restaurant manager's position conditional. Before Musser would take the job, Musser told Lukens that seven other employees would also have to be terminated. Four of the seven named by Musser were the Complainants.

Both Lukens and Musser asserted that age was in no way a factor in either Musser's recommendation or Lukens' ultimate decision to terminate the Complainants. In general, Musser described her perception that the Complainants were the root of much internal strife on the second shift at Frystown and that she believed the Complainants would not be effective employees once she took over the Frystown restaurant management. Perceptions that employees would not be effective members of a new team under new management have been held to be a valid defense to charges of discriminatory discharge. See e.g., Kellner v. General Refractors Co., 631 F. Supp. 939, 41 FEP 538 (N. D. Ind. 1986). Personal animosity is not the equivalent of age discrimination and is not proscribed by the PHRA. See e. g., McCollum v. Bolger, 794 F.2d 602, 41 FEP 507 (11th Cir. 1986), Cert. denied, 107 S. Ct. 883 (U. S. 1987).

Federal cases dealing with alleged discriminatory discharges are replete with successful Respondent defenses which are similar to the rational Musser indicated she had for recommending the discharges of the Complainants. Examples of such successful defenses include: employee failure to cooperate with co-workers, McKenna v. Weinberger, 729 F.2d 783, 34 FEP 509 (D. C. Cir. 1984), and Knoll v. Springfield Township School

Dist., 41 FEP 464 (E. D. Pa. 1986); laxness in duties, difficult to discipline, and contributed to unpleasant work environment, Loftin-Boggs v. City of Meridian, 633 F.Supp. 1324, 41 FEP 532 (S. D. Miss. 1986); and abruptness in dealing with customers, and slowness in handling a position, Desai v. Thompkins County Trust Co., 34 FEP 938 (N. D. N. Y. 1984) aff.d 37 FEP 1312 (2nd Cir. 1984), cert. denied, 37 FEP 1408 (U. S. 1985).

Lukens in effect testified that he wanted Musser to be Spannath's replacement because she had proven that she was the person for the job. In only a few months, Musser had turned around TTMA's faltering restaurant operation at Pine Grove and Lukens wanted the same turnaround for Frystown. To get Musser to accept the Frystown restaurant manager position, Lukens had to terminate not only Spannath but also the four Complainants and three others named by Musser. Lukens asserts that Musser was persuasive when she outlined the deficiencies she perceived each of the Complainants had. Thus, the heart of the Respondent's defense is that, originally, Lukens had not intended to terminate the Complainants but did so because he wanted Musser to accept a managerial position which she would accept only on the condition that the Complainants and several others be terminated. Musser articulated her nondiscriminatory reasons to Lukens which Lukens accepted and thereafter terminated the Complainants.

Since the Respondent successfully offered evidence to rebut the Complainants' prima facie case, in order to prevail, the Complainants must prove that the reasons offered by the Respondent were pretexts for discrimination. In effect, the Complainants must show that the ostensible reasons were not the true basis for their discharges either directly by proving that the Respondent was very likely motivated by discrimination or indirectly by proving that the Respondent's reasons are unworthy of credence.

During the Public Hearing, the Complainants offered the testimony of PHRC investigator Benjamin Simmons, who indicated that shortly after the

Respondent was served with the complaints he called the Respondent and spoke with Lukens. Simmons testified that Lukens told him that the Complainants' performance was not the reason for their terminations. Simmons indicated that Lukens said that he just felt it would be better to have new members for the team that he was making up. It would appear that the Complainants have offered this evidence in an effort to suggest that the reasons advanced at the Public Hearing for the Complainants' discharges are inconsistent with the general statement made to Benjamin Simmons very early in these cases. In Marshall v. Arlene Knitwear, Inc., 454 F. Supp 715 (E. D. N. Y. 1978), aff.d in part & revd in part without opinion, 608 F.2d 1369 (2nd Cir. 1979), a case decided prior to Burdine, Supra, a federal court held that a Respondent failed to prove a legitimate nondiscriminatory reason for a Complainants' discharge where the reasons advanced at trial were inconsistent with the reasons advanced earlier before a State Human Relations Commission. Of course, after Burdine, there is no longer any requirement that a Respondent prove their reason but simply that they be articulated. However, that change still allows for inconsistencies to undermine the credibility of a Respondent's rebuttal, which ultimately weighs on the question of pretext.

Clearly, the ultimate credibility of such conflicting evidence remains with the trier of fact. Hughes v. Black Hills Power & Light Co., 18 EPD ¶8667 (8th Cir. 1978). In Hughes, a Respondent's employment records stated "layoff due to economic conditions" as the reason for an employee's termination. At the hearing, the Respondent's president stated that in his judgment, the employee could not solve certain problems, that it was unlikely the employee would improve, and that the employee was unresponsive to supervision. The Respondent in that case argued that the true reasons for the discharge were not set forth in order not to embarass the terminated employee. The court noted that although the company was less than candid in communicating its reasons for a discharge, the lack of frankness did not

detract from evidence which supported a finding that dissatisfaction with the employee's performance was the true reason for discharge. Id at 4634-35.

Here, there is a degree of inconsistency between Lukens' statement to Simmons and both the Respondent's formal written answers filed shortly thereafter and the testimony eventually offered at the Public Hearing.

Both the Respondent's written answers to the complaints and evidence adduced at the hearing reflect that although the work performance of the Complainants may have been a small consideration, conduct and attitude were greater concerns of Lukens, Musser and other Respondent employees with whom the Complainants worked. The totality of the record in these consolidated cases presents a very strong case for the Respondent. We must always remain mindful of the fact that the ultimate burden of persuasion rests with the Complainants. Lukens may well have fired the Complainants despite a perception that their work performance alone was not poor enough to merit their discharges. Lukens did say that he had originally only intended to fire Spannath. Also, several serious incidents of employee misconduct were noted without aggressive rebuttal as well as circumstances which reflected poor attitude were noted.

Once again, the most pressing reason given for the discharge of the Complainants was that Musser wanted them discharged and Lukens wanted Musser so he went along with her recommendations.

We do not look at whether a Respondent's decision was correct but instead at whether a Respondent's motivation for its decision was not as stated in its rebuttal, but was in fact age discrimination. See e.g., EEOC v. TWA, Inc., 544 F.Supp 1187 (S. D. N. Y. 1982); and Olsen v. Southern Pacific Transportation Co., 480 F.Supp. 773 (N. D. Cal. 1979) aff.d 654 F.2d 733 (9th Cir. 1981). We say this because some effort was made to suggest that the Complainants were good employees. The Complainants' immediate supervisor and another intermittent supervisor both said they had no

problems with the Complainants. Both of these supervisors were also terminated.

On the other hand, another supervisor and a waitress working on the 2nd shift with the Complainants agreed that the Complainants had significant problems. The Respondent's witnesses on this regard offered more detailed testimony and were found to be more credible on this issue.

However, the question for resolution clearly was Musser's perception. The testimony of other Respondent witnesses simply served to bolster Musser's testimony regarding her perceptions of the Complainants and ultimately why she made the Complainants' discharges a condition of her acceptance of the Frystown restaurant manager position.

In sum, the Complainants failed to produce substantial evidence in support of the premise that the reasons offered for the Complainants' discharges were merely a pretext for age discrimination. Having failed to show pretext by a preponderance of the evidence, the Complainants' complaints must be dismissed.

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

GLORIA B. MARTIN, MURIEL DAUB, ELSIE WATTS, AND FERN G. GINGRICH, Complainants	:	
v.	;	Docket Nos. E-24995-A, E-24996-A, E-24997-A, E-24998-A
TRUCK TERMINAL MOTELS OF AMERICA, INC., Respondent	:	

RECOMMENDATION OF HEARING EXAMINER

Upon consideration of the entire record in this case, the Hearing Examiner concludes that Respondent did not violate the Pennsylvania Human Relations Act, and therefore recommends that the foregoing Stipulations, Findings of Fact, Conclusions of Law, and Opinion be adopted by the full Pennsylvania Human Relations Commission, and that a Final Order of dismissal of the above-captioned consolidated cases be entered, pursuant to Section 9 of the Act.

Carl H. Summerson
Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

GLORIA B. MARTIN, MURIEL DAUB, ELSIE WATTS, AND FERN G. GINGRICH Complainants	:	
v.	:	Docket Nos. E-24995-A, E-24996-A, E-24997-A, E-24998-A
TRUCK TERMINAL MOTELS OF AMERICA, INC., Respondent	:	

FINAL ORDER

AND NOW, this 29th day of March, 1989, following review of the entire record in this case, including the transcript of testimony, exhibits, briefs, and pleadings, the Pennsylvania Human Relations Commission hereby adopts the foregoing Stipulations, Findings of Fact, Conclusions of Law, and Opinion, in accordance with the Recommendation of the Hearing Examiner, pursuant to Section 9 of the Pennsylvania Human Relations Act, and therefore

O R D E R S

that the complaints in these consolidated cases be, and the same hereby are dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Thomas L. McGill, Jr.
Thomas L. McGill, Jr.
Chairperson

ATTEST:

Raquel O. de Yeingst
Secretary